

80395-1

No. 57263-9

FILED
JUL 19 2007

CLERK OF SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF ARLINGTON, DWAYNE LANE and
SNOHOMISH COUNTY,

Appellants,

v.

CENTAL PUGET SOUND GROWTH MANAGEMENT HEARINGS
BOARD, STATE OF WASHINGTON; 1000 FRIENDS OF
WASHINGTON nka FUTUREWISE; STILLAGUAMISH FLOOD
CONTROL DISTRICT; PILCHUCK AUDUBON SOCIETY; THE
DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT
OF COMMUNITY, TRADE, AND ECONOMIC DEVELOPMENT;
AGRICULTURE FOR TOMORROW,

Respondents.

PETITION FOR REVIEW BY THE SUPREME COURT

Henry Lippek, WSBA No. 2793
The Public Advocate, n.c.
999 Third Avenue, Suite 1080
Seattle, WA 98115
(206) 689-8510
*Attorney for Respondent
Stillaguamish Flood Control
District*

2007 JUN 28 PM 12:02

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

TABLE OF CONTENTS

I. Identity of Petitioner.....	1
II. Citation to Court of Appeals Decision.....	1
III. Issues Presented for Review.....	1
IV. Statement of the Case.....	2
V. Argument: The Supreme Court should accept review because the Court of Appeals decision is contrary to statutory and case law on a matter of substantial public interest.....	4
A. Preservation of farms is a priority requiring Supreme Court attention.	4
B. The Dwayne Lane II decision, for which review is sought, is contrary to the Growth Management Act and settled case law.....	6
C. Dwayne Lane II misapplies the doctrine of res judicata.....	8
D. Under Dwayne Lane II, even less protection is provided against rural agricultural land conversion than before GMA's enactment, when a developer had to show changed circumstances to qualify for a rezone.....	10
E. A fundamental purpose of the judiciary is to protect vulnerable litigants from repeated assaults by powerful adversaries on decided matters....	12
VI. Conclusion.....	15
Appendix	
A. Court of Appeals decision sought to be reviewed	
B. Order denying reconsideration	
C. RCW 36.70A.20	

Table of Authorities

Cases

<i>Balser Invs., Inc. v. Snohomish County</i> , 59 Wn. App. 29, 795 P.2d 753 (1990).....	14
<i>Belcher v. Kitsap County</i> , 60 Wn. App. 949, 808 P.2d 750 (1991).....	11
<i>Bordeaux v. Ingersoll Rand Co.</i> 71 Wn.2d 392, 429 P. 2d 207 (1967).....	9
<i>Citizens for Mount Vernon v. City of Mount Vernon</i> , 133 Wn.2d 861, 877, 947 P.2d 1208 (1997).....	11
<i>City of Arlington, et al. v. Central Puget Sound Growth Management Hearings Board, et al.</i> , No. 57253-9-I.....	4, 12
<i>City of Redmond v. Central Puget Sound Growth Management Hearings Board</i> , 116 Wn. App. 48, 56-57, 65 P.3d 337 (2003).....	6
<i>DeTray v. City of Olympia</i> , 121 Wn. App. 777, 791, 90 P.3d 1116 (2004).....	8, 11
<i>Hilltop Terrace Assn. v. Island County</i> , 126 Wn.2d 22, 891 P.2d 29 (1995).....	13
<i>Parkridge v. City of Seattle</i> , 89 Wn.2d 454, 573 P.2d 359 (1978).....	11
<i>Satsop Valley Homeowners v. Northwest Rock</i> , 126 Wn. App. 536, 108 P.3 rd 1247 (2005).....	13

Other Authority

David R. Montgomery, <i>DIRT: THE EROSION OF CIVILIZATIONS</i> (Univ. of California Press 2007) at 244, 246.....	5
R. Settle and C. Gavigan, <i>The Growth Management Revolution in Washington: Past, Present, and Future</i> , 16 University of Puget Sound L. Rev. 867, 893 (1993).....	5

I. Identity of Petitioner.

Respondent Stillaguamish Flood Control District (Flood District) is filing this petition.

II. Citation to Court of Appeals Decision.

The Court of Appeals decision that the Flood District wants reviewed is *City of Arlington, et al. v. Central Puget Sound Growth Management Hearings Board, et al.*, No. 57253-9-I, a published opinion filed on March 26, 2007, *Appendix A (Dwayne Lane II)*. Separate motions for reconsideration by the Director, State of Washington Department of Community, Trade, and Economic Development (CTED); Futurewise; and the Flood District were denied by a May 29, 2007 order, *Appendix B*.

III. Issue Presented for Review.

Are parties to a specific land-use controversy that was finally determined following judicial review bound by the outcome in a subsequent proceeding involving the same issues, properties and parties in the absence of a showing of changed circumstances that address and remedy the reasons that caused the proposal to be denied during the first proceeding?¹

¹ The Flood District also joins the separate petitions for review filed today by the Director, State of Washington Department of Community, Trade, and Economic Development (CTED) and Futurewise.

IV. Statement of the Case.

The Stillaguamish River originates in the Cascade Mountains, flows westward draining 684 square mile watershed and enters Puget Sound near Stanwood, WA. The Stillaguamish River flood plain, which begins downriver from the City of Arlington, is one of the most fertile and productive agricultural areas in the world. Much of today's farmland has been farmed since the 1870's.

The Flood District, governed by an unpaid elected 3-member Board of Commissioners, was formed to support commercial agriculture in the lower Stillaguamish by mitigating the damaging effects of floods and to improve water quality. The Flood District's boundaries, containing over 4,000 acres, include the properties within the 100-year flood plain of the lower Stillaguamish River. The Flood District is the local governmental unit with expertise and it is primarily responsible for protection of life and property. It is the guardian of farmers and the protector of the Lower Stillaguamish Valley. The Flood District maintains and operates systems of drainage ways, eight miles of sea dikes, 22 miles of river levees, tidegates, flow maintenance facilities and other works to prevent salt-water intrusion, facilitate drainage, improve agricultural

production, preserve agricultural lands, control flooding, improve water quality, and restore fish habitat.

The Flood District's 2006 budget was \$34,513, based on the assessments of properties within its boundaries.² It is able to perform its functions and undertake award-winning projects with the assistance of volunteers, grants for capital projects, and partnering with other governmental agencies.

Preservation of the agricultural character of this area began long ago and was formalized beginning in the 1970's. *These plans all emphasized that the lower Stillaguamish River flood plain should be limited to agricultural uses.* CP II 299-3222, CP XIII, 2565, 2570-71, CP XV, 2891, 2901-03.

Periodic flooding greatly benefits agricultural production, if floodwaters are promptly drained, because floodwaters deposit fertile topsoils from the upstream watershed. On the other hand, intense urban residential, commercial or industrial development sustains unacceptable damages if inundated with floodwaters. The historical practice of raising the height of urban development in flood plains above the expected elevation of flood waters with fill is now unacceptable and unlawful because it is like putting a brick in a

² Stillaguamish Flood Control District November 16, 2006 meeting minutes.

baking pan of water: It reduces the flood plains' flood water storage capability, increases the elevation and duration of floods for others and triggers the raising levees and dikes that further increase the damages of flooding and the destruction of fish and wildlife habitat.

Dwayne Lane seeks to breach the compact to maintain the rural agricultural character of the lower Stillaguamish flood plain by encroachment of incompatible intense urban commercial uses.

The Snohomish County Council's attempts to avoid the requirements of the Growth Management Act and become an advocate for Dwayne Lane was resisted by the County Executive's veto, and when that was overridden, by the Growth Board, Gubernatorial sanctions, and the Superior Court. Nevertheless, the Court of Appeals reversed the Growth Board, and the Superior Court. The Flood District, and the other respondents, CTED and Futurewise, now ask for Supreme Court review.

V. Argument: The Supreme Court should accept review because the Court of Appeals decision contrary to statutory and case law on a matter of substantial public interest.

A. *Preservation of farms is a priority requiring Supreme Court attention.*

Because of public frustration with gridlocked traffic, soaring housing prices, rapid loss of forests, farms and salmon-bearing

streams, the Growth Management Act (GMA) was enacted to stem the tide of urban sprawl, protect critical areas, and preserve agricultural and other natural resource lands.³ Preservation of agricultural lands is vital:

[W]e can't afford to lose any more farmland. Fifty years from now every hectare of agricultural land will be crucial. Every farm that gets paved over today means that the world will support fewer people down the road. * * *

[T]he inevitable end of fossil-fuel-derived fertilizers, the ongoing loss of cropland and soil poses the problem of feeding a growing population from a shrinking land base.⁴

Once agricultural lands are converted, they are effectively lost to agricultural use forever. Loss of farms is a security problem because food is crucial and the ability to import is dependent on politics in distant countries and cheap transport, often by air. It is a natural resource problem because transporting food long distances uses scarce energy resources and contributes to global warming. The type of farm that is most important to preserve are small family farms, often practicing organic methods, near urban populations.

³ R. Settle and C. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 University of Puget Sound L. Rev. 867, 893 (1993).

⁴ David R. Montgomery [professor of Earth and Space Sciences, University of Washington], *DIRT: THE EROSION OF CIVILIZATIONS* (Univ. of California Press 2007) at 244, 246.

These concerns are reflected in the GMA and, therefore, a central purpose is conserving agricultural lands:

[T]he agricultural lands provisions (RCW 36.70A.020(8), .060, and .170) direct counties and cities (1) to designate agricultural lands of long-term commercial significance; (2) to assure the conservation of agricultural land; (3) to assure that the use of adjacent lands does not interfere with their continued use for agricultural purposes; (4) to conserve agricultural land in order to maintain and enhance the agricultural industry; and (5) to discourage incompatible uses.

City of Redmond v. Central Puget Sound Growth Management Hearings Board, 116 Wn. App. 48, 56-57, 65 P.3d 337 (2003) (*Redmond II*), quoting from *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 14 P.3d 133 (2000).

This issue merits review under RAP 13.4(b)(2) and (4).

B. ***The Dwayne Lane II decision, for which review is sought, is contrary to the Growth Management Act and settled case law.***

The GMA mandate to conserve agricultural lands is repealed if local governments are free of effective review by the Growth Board and the courts when a local government de-designates agricultural lands.

Review is crucial for achieving GMA farm protection purposes because too often the principal concern of local

governments is economic development and increasing tax revenues. Agricultural uses are often less profitable and support lower tax revenues than more intense urban uses and, therefore, local governments are all too eager approve the conversion (actually the destruction) of agricultural lands to more intense urban uses sought by often powerful economic interests. Those same economic interests often successfully resist contributing to the cost of necessary infrastructure. Hence, the current traffic gridlock, unsustainable sprawl, unacceptable pollution, loss of critical wetlands and fish and wildlife habitat, and excessive conversion of farms and forests to urban uses—the very conditions that the GMA was intended to address and remedy.⁵

This issue merits review under RAP 13.4(b)(4).

⁵ RCW 36.70A.020 establishes planning goals that include: (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development. (8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses. (10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water. (11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts. (12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards. *All of the RCW 36.70A.020 planning goals are set forth in Appendix C.*

C. ***Dwayne Lane II misapplies the doctrine of res judicata.***⁶

"In order to prevent repetitious litigation and to provide binding answers, the *res judicata* doctrine bars reasserting the same claim in a subsequent land use application." *DeTray v. City of Olympia*, 121 Wn. App. 777, 785, 90 Wn.3d 1116 (2004).

Nevertheless, the Snohomish County Council and the Growth Board in the prior litigation, following remand, found and determined that Island Crossing was agricultural land of long-term commercial significance. This determination resulted because the Council's and the Board's prior April 15, 1996 finding and determination redesignating Island Crossing from rural agricultural to urban commercial was remanded by the Superior Court in its November 19, 1997 decision on finding there was no substantial

⁶ The Court of Appeals in *Dwayne Lane II* stated (Slip Op. at 23):

The superior court in its decision and the respondents in their briefs misstate the issues and claims that were before the Board and the courts. The inquiry before the Board and the courts in the prior litigation was not whether the land was properly designated agricultural resource land as opposed to urban commercial land. The inquiry was whether the County committed clear error in designating the land agriculture in view of the entire record before the Board and in light of the goals and requirements of the GMA. This distinction is crucial.

evidence to support removal of the agricultural designation from Island Crossing.⁷

The Court of Appeal's observation in *Dwayne Lane II* "that situations may exist where a county could properly designate land either agricultural or urban commercial depending on how the county exercises its discretion in planning for growth, without committing clear error" (Slip Op. at 24) is *not* applicable to Island Crossing because on judicial review in the prior round of litigation, the dedesignation from rural agriculture was *not* affirmed but remanded for lack of substantial evidence supporting the agricultural land dedesignation. Following remand, the Council denied Dwayne Lane's requested redesignation to urban general commercial and instead continued Island Crossing's rural agricultural designation.⁸ In the current round of the Dwayne Lane Island Crossing litigation, rather than making one of two equally viable but conflicting decisions under the same evidence, the

⁷ *1000 Friends v. Snohomish County*, CPSGMHB Case No. 03-3-0019c, FDO, pg 2-4, March 22, 2004, CP 2563-65.

⁸ "Res judicata and collateral estoppel, kindred doctrines designed to prevent relitigation of already determined causes ... res judicata is the more comprehensive doctrine, identifying a prior judgment arising out of the same cause of action between the same parties, whereas a collateral estoppel relates to and bars relitigation on a particular issue or determinative fact...." *Bordeaux v. Ingersoll Rand Co.* 71 Wn.2d 392, 396, 429 P. 2d 207 (1967). Under either doctrine (because the Snohomish County Council in 1998 re-affirmed that Island Crossing is agricultural land of long term significance), Dwayne Lane should have been precluded from re-litigating this issue in a subsequent application.

Council chose to make an erroneous decision a second time, despite the previous finding by the Growth Board and the Superior Court that there was no substantial evidence to support it.

The Council's 1995 dedesignation of Island Crossing from rural agriculture was reversed on appeal by the Superior Court, and following remand, the Council's 1998 determination that Island Crossing's land use should remain rural agriculture was affirmed by the Growth Board, the Superior Court and the Court of Appeals. Therefore, in light of the prior litigation, Island Crossing in the current round is not one of those situations where the County could properly designate Island Crossing urban commercial without committing clear error, in the absence of substantial changed circumstances (which neither Dwayne Lane nor Snohomish County demonstrated or attempted to demonstrate).

This issue merits review under RAP 13.4(b)(1), (2) and (4).

D. ***Under Dwayne Lane II, even less protection is provided against rural agricultural land conversion than before GMA's enactment, when a developer had to show changed circumstances to qualify for a rezone.***

It has long been settled, both before adoption of GMA and afterwards, that in a specific rezone, such as Island Crossing,⁹ the

⁹ As opposed to jurisdiction-wide or area-wide general zoning amendments.

parties seeking the change have the burden of proof to demonstrate that rezone criteria are met (*Parkridge v. City of Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978); see also *Belcher v. Kitsap County*, 60 Wn. App. 949, 808 P.2d 750 (1991)), and the developer bore the burden of demonstrating significant changed conditions. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 877, 947 P.2d 1208 (1997). Even with a showing of a change in circumstances—a substantial change on the ground—a rezone is not mandated; other relevant factors are also to be considered. See, *Balser Invs., Inc. v. Snohomish County*, 59 Wn. App. 29, 795 P.2d 753 (1990). Indeed, where as in Island Crossing, the developer's application was previously denied, the developer has to qualitatively show that the conditions that resulted in the prior denial were addressed and remedied. *DeTray v. City of Olympia*, 121 Wn. App. 777, 791, 90 P.3d 1116 (2004).

Under the Court of Appeals decision for which review is sought, protections for agricultural land dedesignation—despite the many GMA provisions to make such dedesignation extraordinarily difficult—it is now easier under *Dwayne Lane II's* GMA judicial review interpretation than it was before enactment of GMA—when local governments had almost unfettered discretion—to convert

rural agricultural land to urban uses. This result, completely contrary to the purpose and express provisions of GMA, requires Supreme Court correction.

This issue merits review under RAP 13.4(b)(1), (2) and (4).

E. ***A fundamental purpose of the judiciary is to protect vulnerable litigants from repeated assaults by powerful adversaries on decided matters.***

The Flood District is a governmental unit with very limited resources. Amounts paid for litigation expenses reduce resources available for the Flood District's primary functions: Flood control, field drainage and water quality improvement. The Flood District is forced to monitor development proposals to mitigate adverse impacts on the agricultural community within its boundaries. Inappropriate and/or unlawful development, such as Island Crossing, raises flood elevations, increases flood duration, causes drainage or pollution problems, silts up drainage or flood ways, interferes with the operation of tidegates and flow maintenance facilities, or otherwise harms agricultural production.

The Flood District was particularly gratified by the 2001 conclusion of the *Dwayne Lane I* litigation, which affirmed the rural agricultural use designation for Island Crossing. For once GMA

protections to preserve agricultural lands functioned as intended, but after grueling and protracted litigation.

The Flood District's and the other litigant's relief was short lived, for soon Dwayne Lane re-filed the same dedesignation of agricultural lands application, restarting another round of litigation among the same parties, for the same end, and using virtually identical evidence. Only this second time Dwayne Lane, one of the larger auto-dealer chains in the state with apparently unlimited funds to pursue this issue, was supported by a Council majority over the objections of the County's Planning and Development staff, the County Executive, the Growth Board, the Governor and the Superior Court. From the beginning and throughout this current round, the Flood District objected on the grounds of *res judicata* and collateral estoppel—because litigation is supposed resolve controversies.¹⁰

The Court observed in *Hilltop Terrace Assn. v. Island County*, 126 Wn.2d 22, 30-31, 891 P.2d 29 (1995):

¹⁰ The policy of finality of judicial decisions is so strong that a later change in law has no effect on the conclusiveness of an earlier case even if the first decision was erroneous. *Satsop Valley Homeowners v. Northwest Rock*, 126 Wn. App. 536, 108 P.3rd 1247 (2005) (A subsequent change in law can have no effect on the conclusiveness of an earlier case.) SCC 30.74.015, Snohomish County's annual docketing process for land-use amendments, which removed the "changed circumstances" requirement for subsequent rezone applications, was effective in 2004, after the 1995-2001 first round of Dwayne Lane Island Crossing litigation.

The law of res judicata . . . consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once." 4 Kenneth C. Davis, *Administrative Law Treatise* § 21:9, at 78 (2d ed. 1983). The various policies animating the doctrine have been aptly summarized and provide a helpful context:

The most purely public purpose served by res judicata lies in preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results. . . .

A second largely public purpose has been found in preserving courts against the burdens of repetitious litigation.

. . .

The judicial interest in avoiding the public burdens of repetitious litigation is allied with the interest of former litigants in avoiding the parallel private burdens. For the most part, attention is focused on the need to protect a victorious party against oppression by a wealthy . . . adversary. . . .

The deepest interests underlying the conclusive effect of prior adjudication draw from the purpose to provide a means of finally ending private disputes. The central role of adversary litigation in our society is to provide binding answers. We want to free people from the uncertain prospect of litigation, with all its costs to emotional peace and the ordering of future affairs. Repose is the most important product of res judicata. *Citations omitted.*

The *Dwayne Lane II* decision reversing the Growth Board and the Superior Court is contrary to established case and statutory law, and it will impair the rights of downstream property owners, unfairly benefit wealthy businesses at the expense of vital agricultural land preservation and undermine the authority of and the respect for the judicial process.

Dwayne Lane II repealed the Growth Management Act's agriculture protection provisions with two ways: It eliminated Growth Board review by declaring that a local government decision must be upheld if supported with a scintilla of evidence (this and associated issues are addressed in petitions for review by CTED and Futurewise). Second, it undercut the GMA's judicial review provisions. The combined effect of these determinations is to make preservation of agricultural lands of long-term commercial significance less likely under GMA than under prior law.

In the instant case, this problem is compounded Flood plains are well suited for agricultural uses and wholly unsuited for urban commercial uses. The proper land use for Island Crossing was definitively determined under GMA in the prior round of litigation to be rural agricultural. It is contrary to well settled doctrines of *res judicata* to permit endless re-litigation of Island Crossing's land use.

This issue merits review under RAP 13.4(b)(2) and (4).

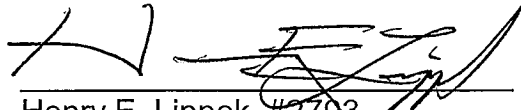
VI. Conclusion.

The Flood District respectfully asks the Supreme Court to accept review.

//

//

Respectfully submitted this June 28, 2007.

A handwritten signature in black ink, appearing to read 'H. E. Lippek', written over a horizontal line.

Henry E. Lippek, #2793
Attorney for Respondent
Stillaguamish Flood Control District

CERTIFICATE OF SERVICE

I certify under penalties of perjury under the laws of the State of Washington that on the date entered below I served the foregoing Flood District petition for review by depositing into the mails of the United States, postage prepaid, in properly sealed and addressed envelopes, upon the following:

Tim Trohimovich/Keith Scully

Futurewise
814 2nd Ave., Ste. 500
Seattle, WA 98104

206-343-0681, fax 206-709-8218
Tim@futurewise.org
Keith@futurewise.org
Attorneys for Futurewise

Alan D. Copsey

Assistant Attorney General
Agriculture & Health Division
P.O. Box 40109
Olympia, WA 98504

360-664-4967, fax 360-586-3564
alanc@atg.wa.gov
Attorney for CTED

Martha P. Lantz

Assistant Attorney General
Licensing & Administrative Law Div.
PO Box 40110
Olympia WA 98504-0110

360 586-2588, fax 360 664-0174
marthal1@atg.wa.gov
Attorney for Central Puget Sound
Growth Management Hearings Bd

John R. Moffat

Deputy Prosecuting Attorney
Admin. E., 7th Floor
3000 Rockefeller Ave MS 504
Everett, WA 98201

425-388-6330, fax 425-388-6333
jmoffat@co.snohomish.wa.us
Attorney for Snohomish County

Steven J. Peiffle

Bailey, Duskin Peiffle & Canfield, PS
P.O. Box 188
Arlington, WA 98223-0188

360 435-2168, fax 360 435-6060
steve@snolaw.com
Attorney for City of Arlington

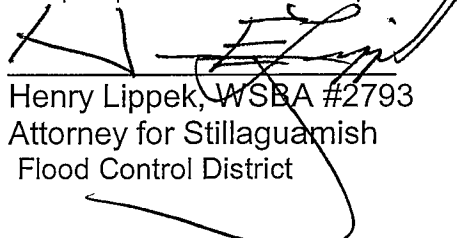
Todd C. Nichols

Cogdill Nichols Rain Wartell
3232 Rockefeller Avenue
Everett, WA 98201

425-259-6111, fax 425-259-6435
toddn@cnrlaw.com
Attorney for Dwayne Lane

Dated June 28, 2007 at Seattle, WA.

The Public Advocate,
a nonprofit professional services corporation


Henry Lippek, WSBA #2793
Attorney for Stillaguamish
Flood Control District

FILED
COURT OF APPEALS ON: #1
STATE OF WASHINGTON
2007 JUN 28 PM 12:03

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF ARLINGTON, DWAYNE
LANE and SNOHOMISH COUNTY

Appellants,

v.

CENTRAL PUGET SOUND GROWTH
MANAGEMENT HEARINGS BOARD,
STATE OF WASHINGTON; 1000
FRIENDS OF WASHINGTON nka
FUTUREWISE; STILLAGUAMISH
FLOOD CONTROL DISTRICT;
PILCHUCK AUDUBON SOCIETY;
THE DIRECTOR OF THE STATE OF
WASHINGTON DEPARTMENT OF
COMMUNITY, TRADE, AND
ECONOMIC DEVELOPMENT and
AGRICULTURE FOR TOMORROW

Respondents.

No. 57253-9-I

DIVISION ONE

PUBLISHED OPINION

FILED: March 26, 2007

GROSSE, J. – The Growth Management Hearings Board must find compliance with the Growth Management Act of 1990 (GMA) unless it determines that a county action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA. Here, the Board failed to consider important evidence in the record that supports Snohomish County's finding that the land at Island Crossing was not land of long-term commercial significance to agriculture and thus eligible for redesignation to urban commercial use. Because, in light of the improperly dismissed evidence, the County's action redesignating the land was not clearly erroneous, we

reverse and remand.

FACTS

This appeal is the latest episode in a long fight over the designation of a triangular piece of land in Snohomish County located north of the City of Arlington. The land borders the interchange of Interstate 5 and State Road 530, and is part of an area known as Island Crossing.

Prior Appeal

The land at issue was designated and zoned agricultural in 1978. In 1995, Snohomish County adopted a comprehensive plan under the Growth Management Act (GMA). As part of the plan, the County redesignated Island Crossing as urban commercial and included it in Arlington's Urban Growth Area (UGA). The Growth Management Hearings Board affirmed the decision in Sky Valley v. Snohomish County, No. 95-3-0068c (Final Decision and Order).¹

In 1997, the Snohomish County Superior Court reviewed the Board's decision affirming the County's action and determined substantial evidence in the record did not support the redesignation of Island Crossing and the inclusion of the land in the UGA. Specifically, the superior court found that Island Crossing is in active/productive use for agricultural crops on a commercial scale and that the area is not characterized by urban growth under GMA standards.

¹1996 WL 734917, pt. 8 of 10, at 86-87 (Wash. Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Mar. 12, 1996).

The superior court remanded to the Board for a detailed examination. The Board in turn ordered the County to conduct additional public hearings on this issue.

The County held public hearings and after considering the oral and written testimony and the Planning Commission's public hearings record, the Snohomish County Council passed two ordinances redesignating Island Crossing as agricultural resource land and removing it from Arlington's UGA. Specifically, the Council found that Island Crossing is devoted to agriculture and is actually used or is capable of being used as agricultural land. It also found that the area is in current farm use with interspersed residential and farm buildings. The County Executive approved the ordinances.

Dwayne Lane, a party in the current case and owner of 15 acres of land bordering Interstate 5 in Island Crossing, challenged the County's designation of Island Crossing as agricultural resource land. Lane planned to locate an automobile dealership on his land at Island Crossing. He filed a petition for review of the County's 1998 decision with the Board, contending that the County failed to comply with the GMA. The Board concluded the County complied with the GMA and that the County's conclusion was not clearly erroneous. The superior court affirmed the Board's decision.

Lane then appealed to this court. Lane argued that the record did not support the Board's decision to affirm the County's designation of Island Crossing as agricultural resource land under the GMA. In an unpublished

decision this court disagreed with Lane, concluding:

Island Crossing is composed of prime agricultural soils and has been described as having agricultural value of primary significance. Except for the County's 1995 dedesignation of Island Crossing as agricultural land, Island Crossing has been designated and zoned agricultural since 1978. Thus, the record supports a finding that Island Crossing is capable of being used for agricultural production. Although Island Crossing borders the interchange of Interstate 5 and State Road 530, it is separated from Arlington by farmland. Indeed, the record contains evidence to indicate that most of the land in Island Crossing is being actively farmed, except a small area devoted to freeway services. Thus, the record indicates that the land is actually used for agricultural production. The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly "prohibits any service tie-ins outside the Freeway Service area." Thus, adequate public facilities and services do not currently exist. Although Lane speculates that it may be possible for him to obtain permits under exceptions to the present restrictions, he fails to demonstrate that such permits can be provided in an efficient manner as required by statute.

Although the record may contain evidence to support a different conclusion, this court cannot reweigh the evidence. Indeed, the record contains substantial evidence supporting the conclusion that the designation of Island Crossing as agricultural land encourages the conservation of productive agricultural lands and discourages incompatible uses in accordance with the GMA. And the removal of Island Crossing from Arlington's UGA is consistent with the GMA's goal to encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. The record supports the Board's decision that the County's designation of Island Crossing as agricultural resource land was not clearly erroneous. Further, as discussed above, Lane failed to show that the Board made a legal error or that its decision was arbitrary and capricious. Thus, he failed to satisfy his burden of showing that the Board's action was invalid and, as a result, Lane is not entitled to relief.²

² Dwayne Lane v. Central Puget Sound Growth Mgmt. Hearings Bd., noted at 105 Wn. App. 1016, 2001 Wash. App. LEXIS 425, at *16-18 (citations omitted).

Current Appeal

Two years later, in September 2003, the Snohomish County Council passed Amended Ordinance No. 03-063. The ordinance amended the County's Comprehensive Plan to add 110.5 acres in Island Crossing to the Arlington UGA, changed the designation of that land from Riverway Commercial Farmland (75.5 acres) and Rural Freeway Service (35 acres) to Urban Commercial, and rezoned the land from Rural Freeway Service and Agricultural-10 Acres to General Commercial.

An appeal was filed with the Board in October 2003. The Board divided the issues into three groups: the redesignation of agricultural resource land (issue 2); urban growth and expansion issues (issues 3 and 4); and critical areas issue (issue 5). The Board declined to address the critical areas issue and that issue is no longer part of this appeal.

Regarding the redesignation of Island Crossing as urban commercial from agricultural resource land, the Board stated in its Corrected Final Decision and Order that the petitioners had carried their burden of proof to show the ordinance failed to be guided by and did not substantively comply with RCW 36.70A.020(8) (planning goal to preserve natural resource land) and that it failed to comply with RCW 36.70A.040 (local governments must adopt development regulations that preserve agricultural lands), RCW 36.70A.060(1) (conservation of agricultural lands) and RCW 36.70A.170(1)(a) (designation of agricultural

lands). The Board found that the County's action was unsupported by the record and thus was clearly erroneous in concluding that the land in Island Crossing no longer met the criteria for designation as agricultural land of long-term commercial significance and remanded the ordinance to the County to take legislative action to bring it into compliance with the goals and requirements of the GMA.

Regarding the Urban Growth Area and expansion issues the Board stated in its decision and order that petitioners had carried their burden of proof to show the ordinance failed to be guided by and did not substantively comply with RCW 36.70A.020(1),(2), and (8) (planning goals requiring encouragement of urban growth in urban growth areas, reduction of sprawl, enhancement of natural resource industries) and that it failed to comply with RCW 36.70A.110 and .215 (limiting UGA expansions to land necessary to accommodate projected future growth and setting priorities for the expansion of urban growth areas) and .210(1). The Board therefore concluded that the County's action regarding the UGA expansion was clearly erroneous and remanded the ordinance to the County to take legislative action to bring it into compliance with the goals and requirements of the GMA. Upon remand the County held new hearings, took new testimony and adopted a new land capacity analysis. Based on the new evidence, the County adopted Emergency Ordinance No. 04-057.

A compliance hearing was held by the Board in June 2004 and the Board entered an Order Finding Continuing Noncompliance and Invalidity and

Recommendation for Gubernatorial Sanctions. The Board found that the County had achieved compliance with RCW 36.70A.215 but had failed to carry its burden of proving compliance with the other GMA provisions.

Snohomish County, the City of Arlington, and Dwayne Lane jointly appealed the Board's Amended Final Decision and Order and the Order on Compliance to the superior court. Futurewise and the Stillaguamish Flood Control District filed a motion to dismiss, claiming that the issue of whether the county ordinances complied with the GMA was barred by res judicata and collateral estoppel. The superior court granted the motion to dismiss and also affirmed the Board's decisions on the merits.

The City of Arlington, Snohomish County and Dwayne Lane appeal.

ANALYSIS

Standard of Review

The appropriate standard of review, as summarized in the recent Supreme Court opinion Lewis County v. Western Washington Growth Management Hearings Board,³ is as follows:

The Growth Management Hearings Board is charged with adjudicating GMA compliance and invalidating noncompliant plans and development regulations. RCW 36.70A.280, .302. The Board "shall find compliance" unless it determines that a county action "is clearly erroneous in view of the entire record before the board and in light of the goals and requirements" of the GMA. RCW 36.70A.320(3). To find an action "clearly erroneous," the Board must have a "firm and definite conviction that a mistake has been committed." Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson

³ Lewis County v. Western Washington Growth Mgmt. Hearings Bd., 157 Wn.2d 488, 139 P.3d 1096 (2006).

County, 121 Wn.2d 179, 201, 849 P.2d 646 (1993). On appeal, we review the Board's decision, not the superior court decision affirming it. King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (hereinafter referred to as Soccer Fields). "We apply the standards of RCW 34.05 directly to the record before the agency, sitting in the same position as the superior court." Id. (quoting City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)).

The legislature intends for the Board "to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of" the GMA. RCW 36.70A.3201. But while the Board must defer to Lewis County's choices that are consistent with the GMA, the Board itself is entitled to deference in determining what the GMA requires. This court gives "substantial weight" to the Board's interpretation of the GMA. Soccer Fields, 142 Wn.2d at 553.^[4]

Furthermore, "[u]nder the Administrative Procedure Act (APA), chapter 34.05 RCW, a court shall grant relief from an agency's adjudicative order if it fails to meet any of nine standards delineated in RCW 34.05.570(3)."⁵ Here, the appellants assert the Board engaged in unlawful procedure or decisionmaking process or failed to follow a prescribed procedure (RCW 34.05.570(3)(c)), the Board erroneously interpreted the law (RCW 34.05.570(3)(d)), the Board's order is not supported by evidence that is substantial when viewed in light of the whole record before the court (RCW 34.05.570(3)(e)), and the Board's order was arbitrary and capricious (RCW 34.05.570(3)(i)).

Errors of law alleged under subsections (c) and (d) are reviewed de

⁴ Lewis County, 157 Wn.2d at 497-98.

⁵ Lewis County, 157 Wn.2d at 498.

⁶ Magula v. Dep't of Labor and Indus., 116 Wn. App. 966, 969, 69 P.3d 354 (2003) (citing City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)).

novo.⁶ Errors alleged under subsection (e) are mixed questions of law and fact, where the reviewing court determines the law independently, then applies it to the facts as found by the Board.⁷ Substantial evidence is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.”⁸

For the purposes of (i), arbitrary and capricious actions include “willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.”⁹ Furthermore, “[w]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.”¹⁰

Redesignation of Island Crossing from Agricultural Resource Land to Urban Commercial

Under the GMA, counties must designate “[a]gricultural lands that are not already characterized by urban growth and that have long term significance for the commercial production of food or other agricultural products.”¹¹ Furthermore, counties must adopt development regulations “to assure the conservation of”

⁶ Magula v. Dep’t of Labor and Indus., 116 Wn. App. 966, 969, 69 P.3d 354 (2003) (citing City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)).

⁷ Lewis County, 157 Wn.2d at 498.

⁸ City of Redmond, 136 Wn.2d at 46 (quoting Callecod v. State Patrol, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)).

⁹ City of Redmond, 136 Wn.2d at 46-47 (quoting Kendall v. Douglas, Grant, Lincoln & Okanogan County Pub. Hosp. Dist. No. 6, 118 Wn.2d 1, 14, 820 P.2d 497 (1991)).

¹⁰ City of Redmond, 136 Wn.2d at 47 (quoting Kendall, 118 Wn.2d at 14).

¹¹ RCW 36.70A.170(1)(a); see also, Lewis County, 157 Wn.2d at 498-99.

those agricultural lands designated under RCW 36.70A.170.¹²

While this case was awaiting oral argument the definition of “agricultural land” for GMA purposes was addressed by the Supreme Court in Lewis County v. Western Washington Growth Management Hearings Board. The court held that three factors must be met before land may be designated agricultural land for the purposes of the GMA. The court stated:

[A]gricultural land is land: (a) not already characterized by urban growth (b) that is primarily devoted to the commercial production of agricultural products enumerated in RCW 36.70A.030(2), including land in areas used or capable of being used for production based on land characteristics, and (c) that has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses. We further hold that counties may consider the development-related factors enumerated in WAC 365-190-050(1) in determining which lands have long-term commercial significance.^[13]

The WAC factors include:

- (a) The availability of public facilities;
- (b) Tax status;
- (c) The availability of public services;
- (d) Relationship or proximity to urban growth areas;
- (e) Predominant parcel size;
- (f) Land use settlement patterns and their compatibility with agricultural practices;
- (g) Intensity of nearby land uses;
- (h) History of land development permits issued nearby;
- (i) Land values under alternative uses; and
- (j) Proximity of markets.^[14]

In the ordinances at issue in this case, Snohomish County made the

¹² RCW 36.70A.060(1)(a); see also Lewis County, 157 Wn.2d at 499.

¹³ Lewis County, 157 Wn.2d at 502.

¹⁴ WAC 365-190-050(1).

following finding regarding whether the land in question was agricultural land for GMA purposes:

The land contained within the Island Crossing Interchange Docket Proposal is not agricultural land of long term commercial significance. Although some of the soils may be of a type appropriate for agricultural use, soil type is only one factor among many others in the legal test for agricultural land of long term commercial significance. The County Council has addressed the question as to whether the land is:

“primarily devoted to the commercial production of agricultural products and has long term commercial significance for agricultural production”

and found that it is not.

At the public hearing, the testimony of Mrs. Roberta Winter (Exh. 111) was very persuasive on this point. Since the mid-1950's, she and her husband had a dairy farm in the very location of the Island Crossing Interchange Docket Proposal site. Locating and then expanding I-5 put them out of the dairy business. They soon discovered that crops generated less revenue than the property taxes. The Winters sold the land because the land could not be profitably farmed.

Council finds that this land cannot be profitably farmed, and is not agricultural land of long term commercial significance.

The Board found that the County's action in redesignating the land was clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA. We find the Board erred in concluding the County committed clear error in determining the land in question has no long-term commercial significance for agricultural production. There is evidence in the record supporting the County's determination on this point, and the Board wrongly dismissed this evidence. Because this evidence supports the County's

finding that the land at Island Crossing has no long-term commercial significance for agricultural production, the Board erred in not deferring to the County's decision to redesignate the land for urban commercial use.

As stated in the Lewis decision, agricultural land for the purposes of the GMA is, among other things, land that "has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses."¹⁵ Furthermore, "counties may consider the development-related factors enumerated in WAC 365-190-050(1) in determining which lands have long-term commercial significance."¹⁶

In regards to whether the land at Island Crossing has long-term commercial significance for agricultural production, the Board stated:

2. Do the 75.5 acres of land at Island Crossing have long-term commercial significance?

Again, the Board answers in the affirmative. The County relies on Finding T, set forth in Finding of Fact 3, supra, to support its conclusion that the Riverway Commercial Farmland no longer has long-term commercial significance. The "evidence" relied upon is testimony from an individual who operated a dairy farm in the vicinity fifty years ago who opined that she sold her farm "because the land could not be profitably farmed." Ex. 111. Anecdotal testimony, particularly from an individual whose direct experience with the area is decades removed from the present and whose declared was in dairy rather than crop farming, does not constitute credible evidence on which to support the County's action. Also, as Petitioners noted, this "Finding" was contradicted by others with present-day experience in crop farming in the Stillaguamish Valley.

¹⁵ Lewis County, 157 Wn.2d at 502.

¹⁶ Lewis County, 157 Wn.2d at 502.

The Board went on to cite the report of the Snohomish County Planning and Development Services (PDS), the Draft Supplemental Environmental Impact Statement (DSEIS), the United States Department of Agriculture (USDA) soils report, and the recommendations of the Snohomish County Agricultural Advisory Board as substantial evidence contrasting sharply with the testimony relied upon by the County.

For example, both the PDS report and DSEIS specifically address the relevant WAC factors and conclude that the land in question is agricultural land of long-term commercial significance:

Analyses of the proposal conducted by PDS conclude that under the GMA's minimum guidelines for classification of agricultural lands, the portion of the proposal site currently designated and zoned for agricultural uses should continue to be classified as such. This conclusion is based on the following analysis of the GMA guidelines:

- Availability of Public Facilities: Public water and sanitary sewer facilities are physically located in and adjacent to the proposal site. However, sanitary sewer service is restricted by the [General Policy Plan (GPP)] to Urban Growth Areas. The shoreline substantial development permit for the existing sewer line restricts availability of sanitary sewer to the existing parcels zoned Rural Freeway Service.
- Tax Status: Several large parcels in the area (approximately 32% of the area) are classified as Farm and Agricultural Land by the Snohomish County Assessor and are valued at their current use rather than "highest and best use." The other parcels in the area, however, are valued and taxed at their "highest and best use".
- Availability of Public Services: Public Services such as public water and sanitary sewer service are physically located within and adjacent to the proposal site. However, sanitary sewer service is restricted by the GPP to Urban

Growth Areas. The existing sanitary sewer line is available by conditions in the shoreline substantial development permit to existing parcels zoned Rural Freeway Service.

- Relationship or proximity to urban growth areas: The proposal site is approximately 0.9 miles from the Arlington city limits and is functionally separated from the City because it is within the Stillaguamish River floodplain. The southern tip of the proposal site, however, is adjacent to the Arlington UGA.
- Land Use Settlement Patterns and Compatibility with Agricultural Practices: Most of the proposal site is currently in farm use with interspersed residential and farm buildings.
- Predominant Parcel Size: Predominant parcel sizes are large and of a size typically found in areas designated commercial farmland. Nine parcels are located within the 75.5 acres of the proposal site designated Riverway Commercial Farmland. Approximate sizes of these parcels are 20.7 acres, 15.8 acres, 14.6 acres, 8.1 acres, 2.9 acres, and three smaller parcels.
- Intensity of Nearby Uses: More intense land uses and urban land developments are located within the Rural Freeway Commercial node at the I-5/SR 530 interchange that has existed essentially in its present configuration since 1968. Farmland is located immediately to the east, and, separated by I-5, to the west.
- History of Land Development Permits Issues Nearby: No urban development permits have been issued in the vicinity of the proposal site except for the substantial shoreline development permit issued for the sewer line that serves only the existing rural freeway commercial uses.
- Land Values under Alternative Uses: The area of the proposal site outside of the Rural Freeway Service designation is in the floodway fringe area of the Stillaguamish River. Higher uses than farming would be difficult to locate in the area because of the floodplain constraints.
- Proximity of Markets: Markets within Arlington, Marysville,

and Stanwood are located in close proximity to the site.

In addition, soils in the proposal area are prime farmland soils as defined by the [United States Department of Agriculture Soil Conservation Service (SCS)] and Snohomish County. . . .

Based on review of the site characteristics and the GMA criteria, the proposal area meets the criteria for an agricultural area of long-term commercial significance. The proposal area contains prime farmland soils, is not characterized by urban growth, and is adjoined by uses that are compatible with agricultural practices.

Respondents argue that the DSEIS is unique because it is "the only comprehensive, GMA-focused analysis" in the record.

However, Dwayne Lane, a litigant in this case, hired consulting firm Higa-Burkholder to conduct a similar analysis employing the WAC criteria, and Higa-Burkholder came to the opposite conclusion. Higa-Burkholder's analyzed the WAC factors as follows:

- (a) Availability of public facilities: The interchange is currently serviced by water and sewer, power, telecommunications, and gas. The fact that sewer expansion is limited by the existing Shoreline permit (1977) only means that to expand sewer service, a proposal must be approved by the Snohomish County Council under a Shoreline Permit application. In fact, the facilities exist and, in the case of water are in use.
- (b) Tax Status: All but one parcel is smaller than 20 Acres Minimum for Open Space Taxation. Many property owners are being assessed tax rates that, according to the Snohomish County Assessor's Office, reflect "freeway influence" implying that the County believes that these properties have a "higher and better use" than agriculture. Taxes on this land are higher than the revenues generated from farming. Tax assessments reflect the availability of water.
- (c) Availability of Public Services: Island Crossing has automobile services, lodging, food, and transit access.

- (d) Relationship and Proximity to UGA: The Arlington UGA border is the southern boundary of the subject area. The City will annex the area through a special election in November of 2003.
- (e) Predominant Parcel Size: The 1982 Snohomish County Agricultural Provision Plan (SCAPP) suggests the optimum size for agricultural parcels is 40 acres with 20 acres minimum for crop production if adjacent to other large parcels. Minimum size for specialty crops is ten acres. A majority of the parcels are smaller than the 20 acres considered minimum for large-scale farming and for qualification for the open space tax abatement program for agriculture.
- (f) Land Use and Settlement Patterns and Their Compatibility with Agricultural Practices: Well-documented conflicts exist with traffic and urban development. Traffic counts have increased to the point where it is dangerous for farm vehicles to cross the highway and certainly to pasture animals that often escape endangering the traveling public. These things limit the viability of agricultural [sic].
- (g) Intensity of Nearby Land Uses: This interchange represents one of two connections to I-5 for a large market area including Darrington, Arlington, Smokey Point and North Marysville. These communities have been some of the fastest growing areas in Snohomish County. Arlington has approved the development of an Airport Industrial Park that has the potential to add 4000 jobs to the community, half of which will use the Island Crossing Interchange over the next ten years.

The Stillaguamish Tribe has developed a tribal center that includes several high traffic generating businesses including a smoke shop, a pharmacy, fireworks store, a police station and a community center. This development is located at the intersection of SR 530 and Old Highway 99. Currently, the Tribe's property is served by City of Arlington Water, but it has no public sewer service. The Tribe has plans to expand their operation at Island Crossing by purchasing other land and converting it to Trust Land.
- (h) History of Development Permits Nearby: Over 200 homes have recently been developed on 47th Street NE less than one half mile from Island Crossing. Smokey Point Boulevard has been the center of residential growth over the past ten years. Island

Crossing represents one of two access points to I-5 for all of this growth.

- (i) Land Values under Alternative Uses: Island Crossing has the potential to benefit Snohomish County economically. Jobs, sales tax revenue and property taxes are but a few of the economic benefits.
- (j) Proximity to Markets: Although this area is in the Puget Sound population center and access to markets for farm products is close by, most production is occurring elsewhere, for example, in Eastern Washington where fewer conflicts with urban land uses, access to large parcels and lower priced land make agriculture viable. Twin City Foods imports its raw product from the east side of the State and no longer grows product in this area.

Relying on our Supreme Court's decision in Redmond, the Board dismissed the entire Higa-Burkholder analysis out of hand. Specifically, the Board construed the Higa-Burkholder report to be "reflections, if not direct expressions, of 'landowner intent'" and assigned it "the appropriate weight."

The Board incorrectly relied on Redmond to dismiss this evidence. In Redmond, the Supreme Court analyzed the meaning of the phrase "devoted to" as used in the GMA definition of agricultural land and held:

While the land use on the particular parcel and the owner's intended use for the land may be considered along with other factors in the determination of whether a parcel is in an area primarily devoted to commercial agricultural production, neither current use nor landowner intent of a particular parcel is conclusive for purposes of this element of the statutory definition.¹⁷

All Redmond holds is that a landowner cannot control whether land is primarily devoted to agriculture by taking his or her land out of agricultural production. It

¹⁷ City of Redmond, 136 Wn.2d at 53.

does not say the Board may dismiss evidence supporting the County's decision if it was obtained at the request of an interested party. The Board erroneously used Redmond as a tool with which to dismiss of an important piece of evidence that supported the County's position with regards to whether Island Crossing was agricultural land of long-term commercial significance. To the extent this evidence supports the County's conclusion that the land was not of long-term commercial significance to agricultural production, and we find that it does, the Board would be required under the GMA to defer to the County and affirm its decision redesignating the land urban commercial.

Expansion of the Arlington UGA

The Board also found the expansion of the Arlington UGA in Amended Ordinance No. 03-063 did not comply with the GMA for two reasons. First, the Board found the record did not contain a valid land capacity analysis demonstrating a need for additional commercial land. In response, the County submitted a Large Plot Parcel Analysis prepared by Higa-Burkholder¹⁸ as part of its statement of compliance and the Board found this action cured noncompliance with RCW 36.70A.215. This issue is therefore not part of this appeal.

Second, the Board found the Expanded UGA including Island Crossing did not meet the locational requirements of RCW 36.70A.110(1), which states in

¹⁸ This is a different report than the one that evaluated whether the land at Island Crossing was agricultural land of long-term commercial significance.

pertinent part:

An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth, or is designated new fully contained community as defined by RCW 36.70A.350.^[19]

The Board concluded in its Corrected Final Decision and Order:

As to whether the expanded UGA for Island Crossing meets the locational requirements of RCW 36.70A.110, the Board agrees with Petitioners. The closest point of contact between Arlington's city limits and private property within the expansion area is approximately 700 feet. . . . Also, the fact that limited sewer service is adjacent to, or even existing within, a rural area is not dispositive on the question of whether the area is urban in character. Therefore, the Board concludes the subject property is not "adjacent to land characterized by urban growth," and does not comply with RCW 36.70A.110(1).²⁰

The Board explained further in its Order Finding Continuing Noncompliance:

No new facts or reasoning are presented to disturb the Board's conclusions that Island Crossing continues to have agricultural lands of long-term commercial significance, that the presence of a sewer line is irrelevant, particularly given its limitations, that the freeway service uses do not rise to the status of "urban growth," and that Island Crossing is not "adjacent" to the Arlington UGA or a residential "population" of any sort. In fact, the private lands within this proposed UGA expansion would be connected to the Arlington UGA only by means of a 700 foot long 'cherry stem' consisting of nothing but public right-of-way. . . . While such dramatically irregular boundaries were common in the pre-GMA era, the meaning of "adjacency" under the GMA precludes such behavior.

"Urban growth" is defined in the GMA as:

growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree

¹⁹ RCW 36.70A.110(1) (emphasis added).

²⁰ (Emphasis in original).

as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170. A pattern of more intensive rural development, as provided in RCW 36.70A.070(5)(d), is not urban growth. When allowed to spread over wide areas, urban growth typically requires urban governmental services. "Characterized by urban growth" refers to land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth.^[21]

We find that the unique location of the land at Island Crossing as abutting the intersection of two freeways and its connection to the Arlington UGA together meet the requirements of RCW 36.70A.110(1). Thus, the County's reliance on such facts in expanding the Arlington UGA was proper and the Board's decision reversing the County's action is erroneous.

The County stated in its ordinance: "This land is located at an I-5 interchange between an interstate highway and a state highway, and is uniquely located for commercial needs of the area. . . . This land has unique access to utilities." In other words, the County concluded that the land is appropriate for urban growth because the land is located at a highway interchange and has unique access to utilities. The County also acknowledged the land has existing freeway service structures on it and is adjacent to the City of Arlington's urban growth area. Taken together, these facts at least support a conclusion that the land in question is "located in relationship to an area with urban growth on it as to be appropriate for urban growth" and thus characterized by urban growth.²²

²¹ RCW 36.70A.030(18) (emphasis added).

Furthermore, the Board's conclusion that Island Crossing is not adjacent to the Arlington UGA for GMA purposes is also erroneous. It is undisputed that the area in question borders Arlington's UGA. The question posed here is whether the 700 foot border consisting entirely of freeway and access road rights-of-way constitute the adjacency to "territory already . . . characterized by urban growth" required by RCW 36.70A.110(1). In reaching its decision the Board emphasized the geography and topography of the land in question and decided that in this case such concerns should control whether the land involved was adjacent to land characterized by urban growth, and not simply the 700 foot UGA boundary to the south.

The Board offers no support for its definition of "adjacent," which to the Board implies something more than the simple dictionary definition of "abutting" or "touching." We decline to adopt the Board's definition of adjacent in favor of the plain meaning of the term. Because the land in question touches the Arlington UGA, it is adjacent to territory already characterized by urban growth for the purposes of RCW 36.70A.110(1).

Res Judicata and Collateral Estoppel

The parties argue much over whether the issues of res judicata and collateral estoppel were timely raised below; however, an analysis of the issues on the merits reveals the superior court erred in granting the motion to dismiss the appeal based on res judicata and collateral estoppel.

²² RCW 36.70A.030(18).

"Resurrecting the same claim in a subsequent action is barred by res judicata."²³ Under the doctrine of res judicata, or claim preclusion, "a prior judgment will bar litigation of a subsequent claim if the prior judgment has 'a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.'"²⁴

"When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel."²⁵ Collateral estoppel, or issue preclusion, requires:

"(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied."²⁶

"In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action."²⁷

Here, the superior court dismissed the appeal on grounds that the appellants' claims were barred by res judicata and collateral estoppel. The superior court stated in its Decision on Appeal Affirming Growth Board:

4.2 In prior proceedings involving many of the same

²³ Hilltop Terrace Ass'n v. Island County, 126 Wn.2d 22, 31, 891 P.2d 29 (1995).

²⁴ In re Election Contest Filed by Coday, 156 Wn.2d 485, 500-01, 130 P.3d 209 (2006) (quoting Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995)).

²⁵ Hilltop Terrace Ass'n, 126 Wn.2d at 31.

²⁶ Shoemaker v. Bremerton, 109 Wn.2d 504, 507, 745 P.2d 858 (1987) (quoting Malland v. Dep't of Retirement Sys., 103 Wn.2d 484, 489, 694 P.2d 16 (1985)).

²⁷ Shoemaker, 109 Wn.2d at 508.

parties, in 1998 the Board affirmed Snohomish County's designation of the subject property (Island Crossing property) as agricultural resource land (75.5 acres) and Rural Freeway Service (35 acres) and removed it from the Arlington urban growth area (UGA). That decision was eventually affirmed by the Court of Appeals in an unreported decision (Dwayne Lane v. Central Puget Sound Growth Management Hearings Board, No. 46773-5-1). In order to re-designate the land, the County must show that there has been a change in circumstances since 1998, and that the property is no longer properly designated as agricultural resource land and Rural Freeway service.

4.3 The Petitioners have failed to demonstrate any material change in circumstances justifying a change in the designation of the land.

The superior court explained further in its oral decision:

As I've already stated, these issues have twice before been the subject of proceedings before the Board and the Court. On both occasions the Court has held that the lands should be properly designated as agricultural, and that the area should not be included in the Urban Growth Area. The causes of action are identical, the persons and parties are the same, although on the second appeal in 2001, the County was on the other side. I don't think this detracts from the applicability of the other principles and the quality of the parties are the same.^[28]

The superior court in its decision and the respondents in their briefs misstate the issues and claims that were before the Board and the courts. The inquiry before the Board and the courts in the prior litigation was not whether the land was properly designated agricultural resource land as opposed to urban commercial land. The inquiry was whether the County committed clear error in designating the land agricultural in view of the entire record before the Board and in light of the goals and requirements of the GMA. This distinction is crucial.

²⁸ (Emphasis added).

In the prior Island Crossing litigation we ultimately held “~~the Board’s decision that the County’s designation of Island Crossing as agricultural resource land was not clearly erroneous.~~”²⁹ This court did not hold that the land was agricultural resource land of long-term commercial significance. We could not have done so even had we tried. This is because the Board’s review is limited to whether “the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA],”³⁰ and our review was limited to whether the Board’s decision was supported by substantial evidence or was arbitrary and capricious.

Because clear error is such a high standard to meet, it follows that situations may exist where a county could properly designate land either agricultural or urban commercial depending on how the county exercises its discretion in planning for growth, without committing clear error. The legislature recognized this when it implemented the clear error standard of review:

In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant great deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter.³¹

A county’s decision to designate land agricultural or urban commercial, or to

²⁹ Dwayne Lane v. Central Puget Sound Growth Management Hearings Board, 2001 Wash. App. LEXIS 425, at *18.

³⁰ RCW 36.70A.320(3).

³¹ RCW 36.70A.320(1) (emphasis added).

expand its urban growth area, is thus an exercise of its discretion that will not be overturned unless found to be clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the GMA.

In the present case, the issues include whether the County's exercise of its discretion in redesignating the same land as urban commercial and expanding the Arlington UGA to include Island Crossing was clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA. This is not the same issue or claim that was before the Board and the courts in the prior litigation. As stated before, the issue in that litigation was whether the County's decision to designate the land agricultural was clearly erroneous. The superior court's decision to bar the appeal on res judicata and collateral estoppel grounds was in error. The appellants were entitled to a decision on appeal as to whether the County's subsequent decision to redesignate Island Crossing was clearly erroneous.

In short, simply because the Board and courts previously held that the agricultural designation was not clearly erroneous in view of the record and in light of the GMA, does not mean that an urban commercial designation would be clearly erroneous in view of the same or similar record and in light of the goals and requirements of the GMA. The prior judgment and the current litigation do not involve the same claim, nor are the issues identical. Thus, the superior court should not have precluded the petitioners from challenging the Snohomish County ordinances at issue in this case.

The superior court's decision is erroneous in another respect. Specifically, the superior court's holding that "[i]n order to re-designate the land, the County must show that there has been a change in circumstances since 1998, and that the property is no longer properly designated as agricultural resource land and Rural Freeway service" impermissibly shifts the burden away from the petitioners. Under RCW 36.70A.320(2), "the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under [the GMA] is not in compliance with the requirements of [the GMA]." In the court of appeals decision in City of Redmond v. Central Puget Sound Growth Management Hearings Board (hereinafter referred to as Redmond II),³² we held that the Board erroneously placed the burden on the city to demonstrate conclusive evidence of changed circumstances in order to justify the de-designation of agricultural resource land. The superior court's ruling that the County be required to show evidence of changed circumstances in order to overcome collateral estoppel and res judicata thus directly conflicts with the statutorily mandated burden of proof set forth in RCW 36.70A.320(2) and affirmed in Redmond II.

In sum, we hold the Board erred in finding the County committed clear error in concluding that the land at Island Crossing had no long term commercial significance to agricultural production. The Board erred because it dismissed a key piece of evidence that supported the County's conclusion on this point.

³² City of Redmond, 116 Wn. App. 48, 56, 65 P.3d 337 (2003).

Because there is evidence in the record to support the County's conclusions, the Board should have deferred to the County.³³

Furthermore, we hold the Board erred in finding the County committed clear error in including the land at Island Crossing within the newly expanded Arlington UGA. There are facts in the record to support the conclusions that the land in question is characterized by urban growth and/or adjacent to territory already characterized by urban growth.

Finally, we hold the superior court erred in dismissing the appeal on res judicata and collateral estoppel grounds. We thus reverse and remand this matter to the Board for a decision consistent with the opinion of this court.³⁴

Grosse, J

WE CONCUR:

Schindler, ACJ Columan, J

³³ See RCW 36.70A.3201.

³⁴ RCW 34.05.574(1); Manke Lumber Co. v. Diehl, 91 Wn. App. 793, 809-10, 959 P.2d 1173 (1998).

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITY OF ARLINGTON, DWAYNE
LANE and SNOHOMISH COUNTY

Appellants,

v.

CENTRAL PUGET SOUND GROWTH
MANAGEMENT HEARINGS BOARD,
STATE OF WASHINGTON; 1000
FRIENDS OF WASHINGTON nka
FUTUREWISE; STILLAGUAMISH
FLOOD CONTROL DISTRICT;
PILCHUCK AUDUBON SOCIETY;
THE DIRECTOR OF THE STATE OF
WASHINGTON DEPARTMENT OF
COMMUNITY, TRADE, AND
ECONOMIC DEVELOPMENT and
AGRICULTURE FOR TOMORROW

Respondents.

No. 57253-9-I

ORDER DENYING MOTIONS
FOR RECONSIDERATION

2007 MAY 29 AM 7:57
COURT OF APPEALS
STATE OF WASHINGTON

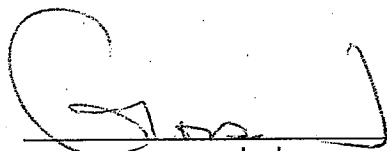
Respondents Stillaguamish Flood District, Futurewise, Pilchuck Audubon Society, Agriculture for Tomorrow, and the Director of the Washington State Department of Community, Trade and Economic Development have filed motions for reconsideration herein. The court has taken the matters under consideration and has determined that the motions for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motions for reconsideration are denied.

Done this 29th day of May, 2007.

FOR THE COURT:


Judge

Appendix C

RCW 36.70A.020

Planning goals.

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

(3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

(4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.

(5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

(6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property

rights of landowners shall be protected from arbitrary and discriminatory actions.

(7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

(9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

(11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

(13) Historic preservation. Identify and encourage the preservation of lands, sites, and structures, that have historical or archaeological significance.